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# Grist v. State Respondent's Brief Dckt. 41409

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

HAROLD EDWARD GRIST, JR., )

Petitioner-Appellant, )

vs. )

STATE OF IDAHO, )

Respondent. )

No. 41409

Nez Perce Co. Case No.

CV-2012-1249

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF NEZ PERCE**

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**HONORABLE CARL B. KERRICK**  
District Judge

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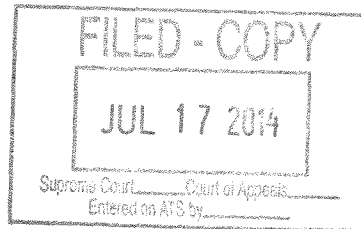
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## STATEMENT OF THE CASE

### Nature Of The Case

Harold Edward Grist appeals from the judgment dismissing his petition for post-conviction relief.

### Statement Of Facts And Course Of The Underlying Criminal Proceedings<sup>1</sup>

"In 2005, Grist was charged with seven counts of lewd conduct with a minor under sixteen, I.C. § 18-1508; one count of sexual abuse of a child under sixteen, I.C. § 18-1506(1)(b); and two counts of sexual battery of a minor child sixteen or seventeen years of age, I.C. § 18-1508A." State v. Grist ("Grist II"), 152 Idaho 786, 788, 275 P.3d 12, 14 (Ct. App. 2012). Grist's victim on all seven counts is J.M.O., who he began abusing shortly after J.M.O., her mother, and her brother moved in with Grist. Id. J.M.O. was 10-years-old when the abuse began and "the abuse continued until she moved out after graduating from high school." Id. The abuse involved Grist having "J.M.O. sit on his lap while he rubbed his pelvis against her" and "progressed as J.M.O. grew older" with Grist eventually starting to "touch J.M.O.'s breasts, buttocks, and vagina." State v. Grist ("Grist

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<sup>1</sup> The Idaho Supreme Court entered an order granting Grist's motion to augment the record "with the Clerk's Record, Reporter's Transcripts and Exhibits (including the confidential PSIs and PSE) from Supreme Court Docket Nos. 33652, 37372 and 40108, State v. Grist." (Order Granting Motion to Augment, dated April 23, 2014.) The state notes that the appeal in Docket No. 40108 was from the Amended Judgment entered pursuant to Grist II and the appeal was dismissed at Grist's request. (#40108 R., pp.3-7, 21-25; Motion to Dismiss, dated January 15, 2013; Order Granting Motion to Dismiss, dated January 16, 2013.)

I”), 147 Idaho 49, 50, 205 P.3d 1185, 1186 (2009). “Grist would also force J.M.O. to undress for him.” Id.

Grist’s first trial, in 2006, resulted in verdicts finding him guilty of all 10 counts. Grist II, 152 Idaho at 788, 275 P.3d at 14. “The district court sentenced Grist for the seven counts of lewd conduct with a minor under sixteen to concurrent unified terms of life imprisonment, with minimum periods of confinement of fifteen years.” Id. “As to the remaining three counts, the district court imposed concurrent determinate periods of confinement of fifteen years, also to run concurrent to his sentences for lewd conduct with a minor under sixteen.” Id. Grist thereafter filed a successful appeal, which resulted in the Idaho Supreme Court vacating his convictions after finding error in the admission of evidence of prior acts of sexual misconduct against a different victim, A.W. Grist I, 147 Idaho at 51-55, 205 P.3d at 1187-1191.

“After retrial by a jury, Grist was again found guilty of all ten counts.” Grist II, 152 Idaho at 788, 275 P.3d at 14. Following the second trial, the district court imposed lower sentences for the seven counts of lewd conduct - life with 10 years fixed instead of 15 fixed – and, “[a]s to the remaining three counts, the district court imposed consecutive determinate periods of confinement of five years, also to run consecutive to his sentences for lewd conduct with a minor under sixteen.” Id. Thus, his aggregate sentence was increased from life with 15 years fixed to life with 25 years fixed. Id.

On appeal following retrial, the Court of Appeals denied Grist’s claim of evidentiary error but granted relief on Grist’s vindictive sentencing claim in the



form of modifying Grist's sentences to those imposed following his first trial. See generally Grist II.

#### Course Of Post-Conviction Proceedings

On June 22, 2012, after the Idaho Supreme Court denied review of the Court of Appeals' opinion following Grist's retrial, Grist filed a *pro se* petition for post-conviction relief alleging four claims: (1) a due process violation in allowing Juror Hendrickson to serve on the jury; (2) ineffective assistance of counsel related to the psychosexual evaluation prepared in relation to his first sentencing, which was also considered at his second sentencing; (3) ineffective assistance of counsel for failing to file a "meritable" Rule 35 motion; and (4) error in the probable cause determination. (R., pp.13-19.) Grist also filed a motion requesting the appointment of counsel, which the court granted. (R., pp.20-22, 28.) The state filed a motion for summary dismissal and a brief in support, to which Grist filed a response. (R., pp.30-42, 52-56.) The court heard oral argument and subsequently entered a written decision summarily dismissing "three of the four claims presented by [Grist]." (R., pp.65-74.) The court denied the motion "with respect to the claim addressing whether trial counsel was ineffective regarding the advice given to [Grist] with respect to the psychosexual evaluation relied upon by the Court at sentencing." (R., p.74.) As to the non-dismissed claim, the court scheduled an evidentiary hearing after which it denied relief on Grist's remaining claim.<sup>2</sup> (R., pp.77, 154-169.) Grist filed a notice of

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<sup>2</sup> Pursuant to the state's motion, the trial transcripts were "admitted" in this case. (R., p.100.)

appeal within 42 days of the court's memorandum decision. (R., pp.172-174.) Judgment was later entered after the appeal was temporarily suspended for that purpose. (Motion for Order Suspending Appeal and Remanding to District Court for Entry of Judgment, dated January 13, 2014; Order to Suspend Appeal and Remand to the District Court for Entry of Judgment, dated January 27, 2014; Final Judgment, filed February 4, 2014; Final Judgment, filed March 11, 2014<sup>3</sup>; Order to Reinstate Appellate Proceedings, dated March 14, 2014.)

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<sup>3</sup> The second final judgment filed on March 11, 2014, eliminated the procedural history language that appeared in the final judgment filed on February 4, 2014; this change was required by an order entered by the Court on March 10, 2014. (Order Conditionally Dismissing Appeal, dated March 10, 2014.)

## ISSUES

Grist states the issues on appeal as:

1. Did the district court err in summarily dismissing Mr. Grist's claim that he was denied due process by the presence of Mr. Hendrickson on the jury on grounds not asserted in the state's motion and brief for summary judgment without giving Mr. Grist 20-days notice and an opportunity to respond as required by I.C. § 19-4906(b)?
2. Did the district court err in summarily dismissing Mr. Grist's claim that he was denied due process by the presence of Mr. Hendrickson on the jury on the basis that the claim should have been raised on direct appeal and that he had not shown a substantial doubt about the reliability of the finding of guilt when the claim could not have been raised on direct appeal and when the proper standard is whether the state can show beyond a reasonable doubt that extrinsic evidence did not contribute to the jury's verdict?
3. Did the district court err in summarily dismissing Mr. Grist's claim that counsel was ineffective for failing to file a meritable Rule 35 motion without proper notice per I.C. § 19-4906(b)?
4. Did the district court err in failing to address Mr. Grist's stand alone Fifth Amendment claim relating to the improper use of the PSE at the second sentencing and should relief be granted on the Fifth Amendment claim because the state has not shown beyond a reasonable doubt that the consideration of the PSE did not affect the sentence imposed?

(Opening Brief of Appellant ("Appellant's Brief"), p.6.)

The state rephrases the issues on appeal as:

1. Has Grist failed to show error in the district court's order summarily dismissing three of his four post-conviction claims?
2. Has Grist failed to show any basis for remanding for further consideration of a "stand alone Fifth Amendment claim" because he never requested findings on any such claim as required by I.R.C.P. 52(b) and because he did not allege a freestanding Fifth Amendment claim in his petition?

## ARGUMENT

### I.

#### Grist Has Failed To Show Error In The District Court's Summary Dismissal Order

##### A. Introduction

Grist contends the district court dismissed two of his claims without providing “proper notice” as required by I.C. § 19-4906(b) and that it also applied the “wrong standard” in dismissing one of those claims. (Appellant’s Brief, pp.6-10.) A review of the record and the applicable legal standards shows none of these arguments have merit.

##### B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

##### C. Summary Dismissal Standards

“Idaho Code § 19-4906 permits a court to rule summarily on applications for post-conviction relief.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) “A court may grant the motion of either party under I.C. § 19-4906(c), or may dismiss the application *sua sponte* under I.C. § 19-4906(b).” Id.

Summary disposition of a post-conviction petition “is appropriate if the applicant’s evidence raises no genuine issue of material fact.” Id. at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)). “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)).

“[W]here a trial court dismisses a claim based upon grounds other than those offered—by the State’s motion for summary dismissal, and accompanying memoranda—the defendant seeking post-conviction relief must be provided with a 20-day notice period.” Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). If “the dismissal is based upon the grounds offered by the State, additional notice is unnecessary.” Id. Where there is “significant overlap between the reasoning in the district court’s decision and the State’s motion to dismiss,” the district court’s reliance on additional reasoning not provided by the state does not make dismissal “so different in kind as to transform its decision into a *sua sponte* dismissal” that would required it to give 20 days notice of its intent to dismiss. Workman, 144 Idaho at 524, 164 P.3d at 804.

D. Grist Has Failed To Show Error In The Summary Dismissal Of His Claim Related To Juror Hendrickson

In his first post-conviction claim, Grist asserted that by allowing Juror Hendrickson to serve on his jury, his due process rights were violated because Juror Hendrickson knew Grist and worked with his “estranged significant other,”

who is also the victim's mother and was a "witness for the state." (R., p.14.) Grist further alleged Juror Hendrickson's presence "implicate[d] . . . Sixth Amendment and Equal Protection principles." (R., p.14.) In its motion for summary dismissal, the state generally asserted Grist's petition should be dismissed because "it presents no genuine issue of material fact" (R., p.30) and, in its supporting brief, the state asserted Grist's "claims fail because there was no actual or implied bias by the juror, no deficient or prejudicial conduct by counsel, and the issues are procedurally barred under I.C. § 19-4901(b). Thus, the petition fails to establish a cognizable claim under Idaho Code § 19-4901(a) and should be summarily dismissed." (R., p.35.) The state also asserted dismissal of Grist's claim relating to Juror Hendrickson was appropriate because (1) "Mr. Hendrickson's presence on the jury did not bias or harm the impartiality of the proceedings," and (2) counsel was not ineffective because "juror selection is a strategic decision made by counsel" and counsel's decision not to exclude Juror Hendrickson was not based on "ignorance or without adequate preparation" as demonstrated by counsel's *voir dire* of Juror Hendrickson. (R., pp.37, 40-41.)

In response to the state's motion, Grist, with the assistance of counsel, complained that the state's motion was based on a "lengthy rendition of alleged *factual* grounds justifying an arbitrary denial of this [claim]," and "resort[ing] to making *factual* arguments" shows "there is a genuine issue of material fact which cannot be resolved by summary disposition." (R., p.54 (emphasis original).) Grist then posited "many possible factual issues" such as whether he told "his trail [sic] attorney that he wanted the juror in question excluded via a peremptory

challenge,” whether his “attorney use[d] up the peremptory challenges and fail[ed] to reserve one to exclude this juror,” and whether “the juror in question poison[ed] the well in the jury room with his knowledge or [sic]” Grist. (R., p.54.)

The district court granted the state's motion for summary dismissal of Grist's first claim on the ground that the issue could have been raised on direct appeal; therefore, under I.C. § 19-4901(b), the claim could not be considered in post-conviction unless Grist demonstrated “that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier.” (R., pp.69-70 (quoting I.C. § 19-4901(b).) The court further concluded Grist failed to satisfy the exception in I.C. § 19-4901(b) because a review of the trial transcript did not support Grist's claim that Juror Hendrickson's presence on the jury violated his due process rights. (R., pp.70-71.)

On appeal, Grist asserts the district court dismissed his first post-conviction claim “without proper notice” since the court's basis for dismissing was different than the basis articulated in the state's motion. (Appellant's Brief, pp.6-8.) Grist also asserts, in relation to his first claim, that the court “dismissed the claim based upon the wrong standards.” (Appellant's Brief, p.8.) More specifically, Grist argues that his juror claim could not be raised on direct appeal because “evidentiary proof is required,” making post-conviction the proper avenue for seeking relief, and that “the proper legal standard for determining prejudice in cases wherein jurors have been exposed to extraneous information or other improper influence is ‘whether the information reasonably could have

produced prejudice, when evaluated in light of all the events and the evidence at trial.” (Appellant’s Brief, pp.8-9 (citing Campbell v. State, 130 Idaho 546, 549-550, 944 P.2d 143, 146-147 (Ct. App. 1997), and quoting Roll v. City of Middleton, 115 Idaho 833, 837, 771 P.2d 54, 58 (Ct. App. 1989).) All of Grist’s arguments fail.

First, Grist’s claim that he did not receive “proper notice” that his claim could be dismissed pursuant to I.C. § 19-4901(b) is belied by the record. The state’s supporting memorandum specifically relies on I.C. § 19-4901(b) as a basis for dismissal. (R., p.35.) Grist’s claim that he did not have notice that his first claim could be dismissed because it could have been raised on direct appeal is without merit.

Second, Grist has failed to show dismissal of his first claim was erroneous.<sup>4</sup> In his petition, Grist framed his first claim as both an independent due process violation and a Sixth Amendment and Equal Protection violation. (R., p.14.) On appeal, Grist only appears to challenge dismissal of the due process aspect of claim one. (See Appellant’s Brief, pp.8-9.) The facts Grist alleged in support of his due process claim are all based on what he contends

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<sup>4</sup> In the event this Court agrees with Grist that he did not receive notice that his claim was subject to dismissal under I.C. § 19-4901(b), such that remand for notice is appropriate, the Court may not need to address Grist’s claim that dismissal under I.C. § 19-4901(b) was improper or his claim that the court applied the incorrect legal standards. However, before remanding, the Court should consider that the district court’s evaluation of the merits of Grist’s juror impartiality claim in the context of the exception in I.C. § 19-4901(b) substantially overlaps with the state’s discussion of the merits of the claim such that even if the state’s citation to I.C. § 19-4901(b) was inadequate for purposes of providing notice, no additional notice was required by the court prior to dismissing the claim.



was “established in open court (on record)” regarding Juror Hendrickson and Juror Hendrickson’s knowledge of Grist, the victim, and her mother. (R., p.14.)

In particular, Grist asserted (verbatim):

[T]he states witness and the juror being co-workers creates a scenerio that leaves an indication of impropriety that the court should of recognized to alleviate any possibility of this matter later becoming a postsentencing challenge issue. For petitioner to make a prima facie showing on this issue he need not have to establish that the picking of the juror was done in a discriminatory manner, but only that the implications of the relationship between the petitioner, the victim, the victims mother and the juror raised reasonable doubt about the jurors ability to be impartial. For a juror to be selected in all fairness he should represent a fair cross-section of the community with no advance information about the case through the media, no ties to the petitioner or the victim. This is not the case here! Petitioner asserts that his right to fundamental fairness under the due process clause has been violated and prejudice should be presumed.

(R., p.14.)

Because Grist framed his claim as one of court error that was supposedly apparent from the trial record, the court did not err in concluding it was a claim that could have been raised on direct appeal. Grist’s argument to the contrary requires reframing the claim as asserted in his petition. Grist’s attempt to re-characterize his claim on appeal is evident in his contention that he “must present clear and convincing evidence” to show “**juror misconduct**” and in his reliance on Campbell, 130 Idaho 546, 944 P.2d 143, for the proposition that his juror misconduct claim “is appropriately raised in a petition for post-conviction relief.” (Appellant’s Brief, p.8 (emphasis added).) However, Grist’s first post-conviction claim is not based on an allegation of misconduct by Juror Hendrickson. It is based on an allegation that Juror Hendrickson should have

been excluded due to a “reasonable doubt” that he could be “impartial.” (R., p.14.) Grist’s efforts to recast his claim as one of juror misconduct as opposed to juror impartiality is improper and his reliance on cases related to allegations of misconduct is misplaced. It is Grist’s analysis of claim one that is erroneous, not the district court’s.

Because Grist has failed to discuss the legal standards relevant to the due process claim he actually raised, he has failed to show error in the summary dismissal of his first claim. Even if this Court considers the unchallenged basis for the district court’s dismissal of this claim, there is no error. In dismissing this claim, the court noted the legal standards governing juror impartiality and the voir dire of Juror Hendrickson. The court specifically relied on State v. Yager, 139 Idaho 680, 85 P.3d 656 (2004) (R., p.70), in which the Idaho Supreme Court stated:

The decision whether a juror can render a fair and impartial verdict is directed to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. It is not incumbent upon the trial judge to find jurors who are totally ignorant of the facts and issues involved in th[e] case. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

139 Idaho at 688, 85 P.3d at 664 (citations omitted).

The district court correctly concluded that nothing in the individual voir dire of Juror Hendrickson required it to *sua sponte* excuse him from the panel. When asked whether he knew Grist, Juror Hendrickson initially answered, “No, I don’t

believe so,” then said, “Oh, wait a minute” at which time Grist interjected, “Yes, you do, I bought materials from you for many years.” (#37372 Tr., p.198, Ls.6-11.) Juror Hendrickson then said, “I’m sorry, I didn’t recognize you with all the growth. I’m sorry, I do. I’m sorry, yes, he did.” (#37372 Tr., p.198, Ls.12-14.) Juror Hendrickson elaborated that Grist conducted “trade business” with his employer and that he also previously worked for the same company as the victim’s mother, Connie, but in “another part of the business,” although they “saw each other in the course of, you know, a day or whatever.” (#37372 Tr., p.199, L.2 – p.200, L.3.) Juror Hendrickson’s interactions with Grist and Connie occurred “eight or ten years” before Grist’s retrial. (#37372 Tr., p.203, Ls.15-19, p.204, Ls.2-4.) However, they did not know one another “on a personal level.” (#37372 Tr., p.200, Ls.4-8.) Juror Hendrickson stated he did not believe his familiarity with Grist or Connie would prevent him from being fair and impartial. (#37372 Tr., p.201, Ls.6-19, p.204, L.24 – p.205, L.8.) As noted by the district court, Juror Hendrickson stated he thought he could “examine the information and make a decision that’s presented before [him]” and he did not “think [he] ha[d] any predetermined . . . disposition one way or the other.” (#37372 Tr., p.205, Ls.4-7 (quoted at R., p.71<sup>5</sup>)). Grist did not object to Juror Hendrickson’s presence on the jury. (See #37372 Tr., pp.205 (no immediate objection after voir dire), 267-269 (panel passed for cause, Juror Hendrickson seated).) And, there

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<sup>5</sup> The district court cites “*Jury Trial Voir Dire Transcript*, Nez Perce County Case CR-05-6894, at 184” (R., p.71); this page citation is different than the official transcript prepared in relation to Grist’s appeal in Docket No. 37372. The state’s page citations will be to the official transcript, which is included in the Supreme Court’s augmentation order. (See p.1 n.1.)

was no basis for the court to excuse Juror Hendrickson *sua sponte*. Grist has failed to show error in the district court's summary dismissal of this claim.

E. Grist Has Failed To Show Error In The Summary Dismissal Of His Claim That Counsel Was Ineffective For Failing To File A Meritorious Rule 35 Motion

In his third post-conviction claim, Grist alleged that the Rule 35 motion counsel was filed was "wholly inadequate" because it was "not supported by an affidavit" with "meritable supporting facts for the court to consider." (R., p.16.) Grist further alleged the "register of action[s] . . . does not show any record of the court entertaining the motion of [sic] issuing an order denying it" and that, if the court did deny the motion, counsel was ineffective for failing to notify Grist so that he could appeal any such denial. (R., pp.16-17.)

Although the state did not specifically discuss Grist's Rule 35 claim, as previously noted, in its motion for summary dismissal, the state asserted Grist's petition failed to allege a "genuine issue of material fact" and, in its memorandum, the state asserted Grist failed to establish any "deficient or prejudicial conduct by counsel." (R., pp.30, 35.)

The court dismissed Grist's third claim because Grist "failed to show there was any evidence that his counsel could have presented in support of a Rule 35 motion that would have created a reasonable likelihood th[e] Court would have reduced or modified [his] sentence." (R., p.73.) This conclusion is supported by the record since Grist's petition includes no explanation of what arguments or facts counsel should have presented in support of the motion. (See R., pp.16-17.) In other words, Grist failed to allege a genuine issue of material fact in

support of this claim and he did not elaborate on the claim in response to the state's motion, instead asserting he had "nothing to add to what [was] already said in his petition." (R., p.55.) In fact, it appears post-conviction counsel agreed that Grist's Rule 35 did not warrant an evidentiary hearing, advising the court at the hearing on the state's motion for summary dismissal that, although he was not "withdrawing" any of Grist's claims, he only intended to pursue the claims he believed were supported by a "valid legal or factual theory," which did not include Grist's Rule 35 claim. (10/18/2012 Tr., p.10, L.14 – p.11, L.10.)

Grist's only argument on appeal related to this claim is that he did not receive "proper notice" of the grounds for dismissal since "the state did not offer any reasons why [his] ineffective assistance of counsel claim relative to the Rule 35 motion should be summarily dismissed," but the court did. (Appellant's Brief, p.10.) To the contrary, the state contended Grist failed to allege a genuine issue of material fact and failed to establish deficient performance or prejudice. (R., pp.30, 35.) That the court elaborated on Grist's failure to meet his burden does not mean it dismissed on a different ground than that asserted by the state. Grist's claim to the contrary is without merit. As explained in DeRushé v. State, 146 Idaho 599, 601-602, 200 P.3d 1148, 1150-1151 (2009) (citations omitted):

If the ground for summary disposition is that assertions by the applicant are not admissible evidence, stating the ground with reasonable particularity requires no more than the level of particularity required to object to the admissibility of that evidence, such as that it is conclusory, hearsay, or lacking foundation. It is rarely necessary to further explain those objections. If the ground for summary disposition is that there is no admissible evidence on an essential element of a claim, reasonable particularity only requires pointing that out. For example, claims of ineffective assistance of defense counsel or of prosecutorial misconduct in

withholding evidence favorable to the accused both require prejudice to the defendant. Reasonable particularity only requires pointing out that there is a lack of evidence showing prejudice. It does not require explaining what further evidence is necessary, particularly since it may not exist.

Further, to the extent Grist believes the state's motion did not address his Rule 35 claim with sufficient particularity, he was "represented by counsel," and "should have raised that issue below." DeRushé, 146 Idaho at 602, 200 P.3d at 1151. There is no indication in Grist's response to the state's motion that he did not understand that the state believed his Rule 35 claim was subject to dismissal for failing to establish a genuine issue of material fact on deficient performance and prejudice. (See R., p.55.) Indeed, at no time during the 15-month period between the court's partial summary dismissal order and the final judgment did Grist complain about the inadequacy or lack of any notice in relation to dismissal of that claim or make an effort to establish a genuine issue of material fact that counsel was ineffective in relation to his Rule 35 motion. This Court should decline to consider, for the first time on appeal, any claim of error related to the particularity of the state's motion. DeRushé, supra.

Grist has failed to show any error in the summary dismissal of his third post-conviction claim.

## II.

### This Court Should Decline Grist's Request To Remand For Consideration Of His Alleged Freestanding Fifth Amendment Claim Because He Did Not Request A Ruling From The Trial Court On Such A Claim And Review Of His Petition Shows That He Did Not Plead Such A Claim

#### A. Introduction

Grist contends the district court erred in “failing to address [his] stand alone Fifth Amendment claim relating to the improper use of the PSE at the second sentencing.” (Appellant's Brief, p.10 (capitalization altered).) This Court should decline to consider Grist's argument because he did not request a ruling from the district court on his alleged freestanding Fifth Amendment claim as required by I.R.C.P. 52(b). Further, the record shows that Grist's petition does not allege such a claim; therefore, the court did not err in failing to rule on it.

#### B. Standard Of Review

A petitioner for post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which his claim is based. Idaho Criminal Rule 57(c); Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986). A trial court's decision that the petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990). Further, the credibility of the witnesses and the weight to be given to the testimony are matters within the discretion of the trial court. Rueth v. State, 103 Idaho 74, 644 P.2d 1333 (1982).

C. Grist Has Failed To Show Any Basis For Remanding For Consideration Of His Alleged "Stand Alone" Fifth Amendment Claim

In his second post-conviction claim (hereinafter "Estrada claim"), Grist asserted

his right to due process as found under the 5th Amendment and his right to effective assistance of counsel as found under the 6th Amendment have both been violated by the Court using an outdated psychosexual [sic] evaluation that was ordered by the court and prepared in violation of the 5th Amendment right to be free from self-incrimination.

(R., p.15.)

Grist further asserted (verbatim):

The District Court originally ordered the petitioner to submit to a psychosexual evaluation at the sentencing phase of his first trial. At this time petitioner had the right to effective assistance of counsel in regard to be fully advised about not only the right to refuse such an order to take such a test, but a given right to be advised by counsel of the advantages and disadvantages of taking the evaluation and as to how any adverse information that was formulated as a result of the evaluation could and would be used against the petitioner. In this regard trial counsel representation completely failed in this matter as he failed to advise about any adverse effects that could be a repercussion from the evaluation or that the petitioner had a right to refuse to participate in this matter. To further compound the neglect, counsel should of informed the petitioner that they, the defense could initiate their own evaluation and retain the discretion on whether to use any information from the evaluation or not. This issue brings into play the holdings found under the Idaho case of Estrada Vs. State<sup>6</sup> . . .

The evaluation was taken in violation of the petitioners 5<sup>th</sup> Amendment and is tainted States trial discovery. The use of this inflammatory information should of been objected to in petitioners first trial, but specifically objected to its use in petitioners re-trial. For trial counsel to fail to object for its use in petitioners second trial is a blantant disregard for his clients best interest and is ineffective

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<sup>6</sup> Estrada v. State, 143 Idaho 558, 149 P.3d 833 (2006).



assistance of counsel on its 'face' as found under the applicable standard of [Strickland<sup>7</sup>].

(R., p.15.)

Although the state sought summary dismissal of Grist's Estrada claim (R., pp.38-40), the district court denied the request, characterizing the claim solely as one of ineffective assistance of counsel and stating, "there is a material issue of fact with respect to whether counsel was ineffective for failing to object to the use of the psychosexual evaluation at sentencing." (R., p.72.) Regarding the scope of the evidentiary hearing, the court stated:

Specifically, an evidentiary hearing must be held on the limited issue of whether counsel advised [Grist] regarding his Fifth Amendment right to remain silent with respect to the psychosexual evaluation; and concurrently, whether counsel advised [Grist] regarding his rights pertaining to the use of the psychosexual evaluation with respect to sentencing after the second trial.

(R., pp.72-73.)

At the evidentiary hearing, Grist called three witnesses – the defense attorney who represented him at his first trial and sentencing (Sunil Ramalingam), the defense attorney who represented him at his second trial and sentencing (William Fitzgerald), and himself. (See generally 5/10/2013 Tr.) The evidence Grist presented at that hearing revolved around Ramalingam's advice in relation to Grist's participation in the psychosexual evaluation and Fitzgerald's advice in relation to whether Grist should participate in another evaluation prior to his second sentencing and whether Fitzgerald objected to use of the original evaluation. (Id.)

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<sup>7</sup> Strickland v. Washington, 466 U.S. 668 (1984).

After the evidentiary hearing, the court denied relief on Grist's Estrada claim. (See generally R., pp.154-169.) With respect to deficient performance, the court concluded Grist "met his burden with respect to the first prong of the *Strickland* analysis: trial counsel was deficient for failing to object to the trial court's review of the 2006 psychosexual evaluation." (R., p.161.) In support of this conclusion, the court noted:

The sole issue before this Court is whether trial counsel was ineffective at sentencing for failing to object to the use of the 2006 psychosexual evaluation at sentencing following the second trial in 2009. [Grist] participated in this evaluation but he had not been advised of his Fifth Amendment right to remain silent. The psychosexual evaluation was completed in 2006, prior to . . . *Estrada*[.] Attorney Sunil Ramalingan testified he did not advise [Grist] regarding his Fifth Amendment rights at the time [Grist] participated in the evaluation.

...

In the case at hand, [Grist] argues that counsel was ineffective for failing to object to the presentation of the psychosexual examination from 2006. The record is clear [Grist] was not advised of his rights with respect to the 2006 evaluation. There is no dispute that [Grist] was advised of his right with respect to a second evaluation, and as a result, [Grist] invoked his right to remain silent. The record does not provide evidence from the second trial that counsel objected to the use of the 2006 psychosexual evaluation at sentencing.

(R., p.158-160 (footnote omitted).)

The court, however, found Grist did not meet his burden of showing prejudice and therefore denied relief on Grist's Estrada claim. (R., pp.161-168.)

Grist does not challenge any of the district court's factual findings or legal conclusions. Instead, Grist complains the "district court erred in not considering

the Fifth Amendment violation” and asks the Court to remand for that purpose. (Appellant’s Brief, p.11.) This Court should reject Grist’s request for two reasons.

First, if Grist believed the district court failed to address part of his Estrada claim in its order denying relief after an evidentiary hearing, he was required to raise that argument to the district court. Rule 52(b), I.R.C.P. provides: “No party may assign as error the lack of findings unless the party raised such issue to the trial court by an appropriate motion.” Because Grist did not “raise[ ] such issue to the trial court,” his appellate claim of error related to the court’s alleged failure to address part of his Estrada claim should not be considered.

Second, Grist’s Estrada claim does not include a “stand alone” claim of a Fifth Amendment violation. As such, there can be no error in the court’s failure to rule on such a “claim.”

An application for post-conviction relief must “specifically set forth the grounds upon which the application is based, and clearly state the relief desired.” I.C. § 19-4903; Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004); Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008). Pursuant to I.C. § 19-4908, “[a]ll grounds for relief must be raised in the original, supplemental, or amended application.” Monahan, 145 Idaho at 875, 187 P.3d at 1250 (citing I.C. § 19-4908) (emphasis added); Dunlap, 141 Idaho at 56, 106 P.3d at 382. A ground for relief known to the petitioner but not set forth in the original, supplemental or amended application is waived. I.C. § 19-4908. Lake v. State, 126 Idaho 333, 882 P.2d 988 (Ct. App. 1994); see also Kelly v. State, 149 Idaho 517, 523-24, 236 P.3d 1277, 1283-84 (2010) (“It is clearly established

under Idaho law that a cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.") (citations and internal quotation marks omitted); Cole v. State, 135 Idaho 107, 110-11, 15 P.3d 820, 823-24 (2000) (district court did not err in summarily dismissing post-conviction petition without considering claims neither alleged in the original petition, nor properly before the court in an amended petition filed without leave of the court).

Although Grist unquestionably cited the Fifth Amendment as part of his Estrada claim, his reference to the Fifth Amendment was merely a component of his Sixth Amendment ineffective assistance of counsel claim. Such an interpretation of Grist's claim, which is clearly how the district court understood it, is consistent with Grist's reliance on Estrada and Strickland. Strickland is the quintessential case relied on by petitioners advancing an ineffective assistance of counsel claim and the Court in Estrada simply applied Strickland to advice relating to a psychosexual exam. Indeed, the Court's analysis in Estrada began with an examination of "whether a court-ordered psychosexual evaluation constitutes a critical stage of litigation at which the **Sixth Amendment** right to counsel applies." 143 Idaho at 561, 149 P.3d at 836 (emphasis added). Concluding that a psychosexual evaluation is a critical stage that entitles a defendant "to at least the advice of counsel regarding his participation in the psychosexual evaluation," the Court evaluated whether Estrada was denied the effective assistance of counsel in relation thereto. Id. at 563, 149 P.3d at 838. That analysis was conducted within the Strickland framework. Id. at 563-565,

149 P.3d at 838-840. Although the Court in Estrada discussed “the significance and extent of a defendant’s right against self-incrimination” it did so in the context of “evaluating the potential deficiency of Estrada’s attorney” because whether counsel was deficient depended on whether “Estrada could assert the Fifth Amendment privilege against self-incrimination during the psychosexual evaluation.” 143 Idaho at 563-564, 149 P.3d at 838-839. Grist’s reliance on Strickland and Estrada supports the conclusion (and the district court’s opinion) that his Estrada claim was a Sixth Amendment claim, not a Sixth Amendment claim **and** a freestanding Fifth Amendment claim. And, the evidence Grist presented at the evidentiary hearing is consistent with this interpretation of the scope of Grist’s Estrada claim.

Grist also argues that the district court’s conclusion that counsel was deficient for failing to object to consideration of the psychosexual evaluation at the second sentencing includes an “[i]mplicit . . . conclusion that an objection to the use of the PSE would have been sustained because use of the PSE would violate the Fifth Amendment.” (Appellant’s Brief, p.11.) Grist is incorrect. The deficiency found by the district court was the failure to object to the use of the psychosexual evaluation at Grist’s second sentencing because the evaluation was conducted without the benefit of advice regarding the right not to participate (R., pp.158-161), which is a different question than whether “use of the PSE would violate the Fifth Amendment.” Use of a psychosexual evaluation in which the defendant voluntarily participates does not result in a Fifth Amendment violation. See Minnesota v. Murphy, 465 U.S. 420, 427-29 (1984) (Fifth

Amendment right against self-incrimination is not self-executing but must be affirmatively invoked). While Grist may not have invoked his right not to participate because he was unaware of the right, that lack of awareness presents a Sixth Amendment question, not a Fifth Amendment question.

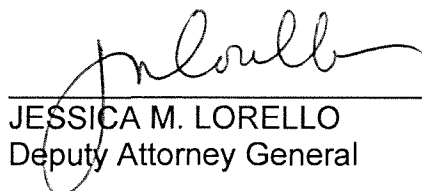
Finally, if this Court finds Grist's petition does allege a freestanding claim of a Fifth Amendment violation based on the court's consideration of the evaluation at his second sentencing, the state notes that Grist's claim that such an allegation would require the state to prove "the error was harmless beyond a reasonable doubt" is without merit. (Appellant's Brief, p.11.) A freestanding Fifth Amendment claim would be subject to dismissal in post-conviction because it is a claim that could have been raised on direct appeal. I.C. § 19-4901(b). And, because Grist did not object to consideration of the evaluation at his second sentencing (see R., p.160), it would have been his burden to show a "reasonable probability" that consideration of the evaluation "affected the outcome" of his sentence, State v. Skunkcap, --- P.3d ----, 2014 WL 2726932 \*14 (2014), not the state's burden to show any error was harmless.

Grist has failed to show error in the district court's denial of post-conviction relief and has failed to establish any basis for remanding this case.

CONCLUSION

The state respectfully requests that this Court affirm the district court's denial of post-conviction relief.

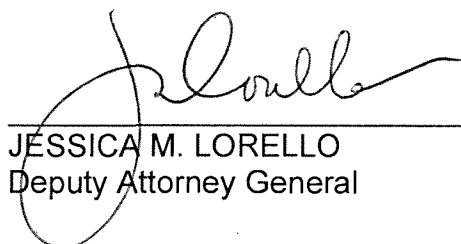
DATED this 17<sup>th</sup> day of July 2014.

  
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JESSICA M. LORELLO  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17<sup>th</sup> day of July 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DEBORAH WHIPPLE  
NEVIN, BENJAMIN, McKAY & BARTLETT  
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\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

JML/pm